No. 03-1160

Supreme Court, U.S.
FILED
AUG 23 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, AND POLICE DEPARTMENT OF THE CITY OF JACKSON, MISSISSIPPI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a disparate impact theory of liability is available under the Age Discrimination in Employment Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT LIABILITY	4
A. The ADEA's Text, Structure and Purpose Do Not Support Disparate Impact Claims	4
B. The EEOC's Interpretation Is Not Entitled To Deference	13
II. JUDICIAL CREATION OF AN ADEA DISPARATE IMPACT CLAIM WOULD SERIOUSLY UNDERMINE THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO EFFECTIVELY MANAGE THEIR WORKFORCES	19
CONCLUSION	29

TABLE OF AUTHORITIES

Cases — Page

Adams v. Florida Power Corp., 535 U.S. 228 (2002) 18
Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 4, 13, 17
DiBiase v. Smithkline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) 6, 8, 12
District Council 37 v. New York City Dep't of Parks & Rec., 113 F.3d 347 (2d Cir. 1997) 25, 26
Duncan v. Walker, 533 U.S. 167 (2001) 6
EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994) 12
EEOC v. Governor Mifflin School Dist., 623 F.Supp. 734 (E.D. Pa. 1985) 24
EEOC v. Wyoming, 460 U.S. 226 (1983) 9, 12
Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996) 6
Geller v. Markham, 481 F.Supp. 835 (D. Conn. 1979), *aff'd*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 21, 24
General Dynamics Land Systems, Inc. v. Cline, 124 S.Ct. 1236 (2004) 5
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ... *passim*
International Bhd. Of Teamsters v. United States, 431 U.S. 324 (1977) 15, 23, 26
Laugesen v. Anaconda Corp., 510 F.2d 307 (6th Cir. 1975) 17
Leftwich v. Harris-Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982) 21-22, 22, 23
Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) 21, 22, 23, 24
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 13

TABLE OF AUTHORITIES—Continued

Page

MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991) 24
Markham v. Geller, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) ..... *passim*
Markham v. Geller, 451 U.S. 945 (1981) 20, 21
Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) 23
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 5
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 17, 20
Mete, et al., v. New York State Office of Mental Retardation & Dev. Disabilities, 984 F.Supp. 125 (N.D.N.Y. 1997) 26
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) 12
Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989) 11
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 4, 13, 13-14
Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996) 27
United States v. Mead Corp., 533 U.S. 218 (2001) 13, 13-14
United States v. Naftalin, 441 U.S. 768 (1979) 8
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 9

Statutes and Regulations

Age Discrimination In Employment Act
29 U.S.C. § 623(a)(1) 9
§ 623(a)(2) ..... *passim*
§ 623(f)(1) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
29 C.F.R. 860.103(c) (1968)	14
29 C.F.R. 860.103(d) (1968)	14
29 C.F.R. 860.103(h) (1979)	20
29 C.F.R. 860.104(b) (1969)	15
29 C.F.R. 1625.7(d) (1981)	16, 24
Civil Rights Act of 1964, title VII, Pub. L. No. 80-352, 78 Stat. 253, codified as amended at 42 U.S.C. § 2000e-§ 2000e-17	
42 U.S.C. § 2000e-2	12
§ 2000e-2(a)(1)	5
Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, codified at 42 U.S.C. § 2000e-2(k)	6
Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 979, codified at 29 U.S.C. § 623(f)(2)	11
Other Authorities	
The American Heritage Dictionary Of The English Language (1981)	7
33 Fed. Reg. 9172 (Jun. 21, 1968)	14
33 Fed. Reg. 9173 (Jun. 21, 1968)	2, 14
34 Fed. Reg. 323 (Jan. 9, 1969)	15
44 Fed. Reg. 68858 (Nov. 30, 1979)	3, 16
44 Fed. Reg. 68858-62 (Nov. 30, 1979)	16
46 Fed. Reg. 47724 (Sept. 29, 1981)	15
46 Fed. Reg. 47724-28 (Sept. 29, 1981)	16
46 Fed. Reg. 47725 (Sept. 29, 1981)	3, 15, 16, 17
46 Fed. Reg. 47727 (Sept. 29, 1981)	16
Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982)	6, 8, 9

TABLE OF AUTHORITIES—Continued

	Page
Barbara Lindemann, *et al.*, *Employment Discrimination Law* (3d ed. 1996)	11, 28
Barbara Lindemann & David D. Kadue, *Age Discrimination in Employment Law* (2003)	15
Donald R. Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L.J. 437 (1984)	16
U.S. Dep't of Labor, *The Older American Worker: Age Discrimination In Employment* (1965)	*passim*
Webster's New International Dictionary (2d ed. 1955)	7
Webster's Third New International Dictionary (1986)	7
Letter from W. Willard Wirtz, Secretary of Labor, to Hon. John H. McCormack, Speaker, U.S. House of Representatives, and Hon. Hubert H. Humphrey, Pres., U.S. Senate (Jan. 23, 1967)	10

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] As public employers, *amici* have an especially strong interest in legal issues that affect their ability to manage their workforces in a cost-effective manner.

Amici condemn invidious age-based discrimination against workers over the age of forty. Indeed, the States were at the forefront in banning arbitrary age-based discrimination. *See* U.S. Dep't of Labor, *The Older American Worker: Age Discrimination In Employment* 9 (1965). *Amici* thus fully recognize the need for remedies to address intentional age-based employment discrimination.

In contrast, the issue in this case—whether disparate impact claims are cognizable under the ADEA—raises the troubling prospect that public employers will be subject to liability because of necessary work practices which have been undertaken for reasons totally unrelated to age. As the court of appeals correctly recognized, the ADEA's text, structure and purpose do not support disparate impact liability.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. The text of ADEA section 4(a)(2) does not support disparate impact liability. Section 4(a)(2)'s prohibition against an employer's taking various employment actions

---

[1] The parties have consented to the filing of this brief *amicus curiae* and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

"because of [an] individual's age," 29 U.S.C. § 623(a)(2), is most naturally read as prohibiting only intentional age-based discrimination. Indeed, the Court has expressly recognized that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

The Court has further explained that Congress enacted the ADEA "prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* As the Court has noted, an age-neutral employment practice does not present the problem of inaccurate and stigmatizing stereotypes even if the practice correlates with age. *See id.* at 611.

There is no merit to petitioners' contentions that it "is almost incomprehensible" to construe section 4(a)(2) as barring disparate impact liability "given the presence of precisely the same language in Title VII," or that to reject petitioners' reading of section 4(a)(2) is to "inescapably argu[e] that *Griggs* was wrongly decided." Pet. Br. 22 On the contrary, section 4(a)(2) must be construed in light of the ADEA's structure and purpose. Most significantly, the ADEA—unlike Title VII—expressly recognizes the authority of employers to differentiate between employees "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). As several courts of appeals have recognized, this provision is antithetical to the notion that disparate impact claims are cognizable under the ADEA.

2. Nor is there any merit to petitioners' contentions that both the EEOC and DOL have consistently interpreted the ADEA as authorizing disparate impact liability. Contrary to petitioners' assertion, DOL's original rulemaking observed that "[t]he clear purpose" of the ADEA "is to insure that age . . . is not a determining factor" in making employment decisions. 33 Fed. Reg. 9173 (Jun. 21, 1968). When an

employer applies an age-neutral work rule, age is clearly not a determining factor even when a rule correlates with age.

Moreover, when the EEOC rewrote the regulation "to make it clear that" age-neutral practices could be challenged if they have a disparate impact, 46 Fed. Reg. 47725 (Sept. 29, 1981), the agency made no attempt to reconcile its rule with the ADEA's text, purpose, and the nature of age discrimination. Rather, the EEOC adopted disparate impact analysis because of its conclusion—on a matter of pure statutory construction—that the ADEA should "be interpreted in a manner which is consistent with Title VII." 44 Fed. Reg. 68858 (Nov. 30, 1979).

This legal conclusion is patently unreasonable. As Secretary Wirtz explained, "the easy thing to do would be simply to extend the conclusions derived from [the societal problems Title VII addresses] to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy—and wrong.*" *The Older American Worker, supra*, at 1 (emphasis added).

3. Many essential workforce practices have some correlation with age. For example, there are times when the fiscal constraints faced by public employers require layoffs or limit the funds available for pay and benefits. Even when public employers have responded to fiscal hardship by using age-neutral practices, they have been frequent targets of lawsuits brought by those within the ADEA's protected class. Relying on disparate impact analysis, some courts have imposed liability on public employers notwithstanding the lack of any probative evidence that the employer was motivated by age-bias or stereotypes. And even when public employers ultimately prevail on the merits, the litigation costs of defending these actions can erode the cost-savings that an employment policy or rule was intended to provide.

ARGUMENT

I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT LIABILITY

The court of appeals correctly held that petitioners were not entitled to proceed with their ADEA disparate impact claim. As that court and four other courts of appeals have recognized, it is erroneous "to limit [the] construction calculus solely to the [textually similar] prohibitory sections of the ADEA and Title VII," Pet. App. 10a, and to assume that because such a claim is cognizable under Title VII, it must likewise be available under the ADEA.

As explained below, the text, structure and purpose of the ADEA make clear that Congress did not intend for there to be disparate impact liability under the ADEA. Petitioners' attempt to place the statute within the rules of *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rests on implausible constructions of the ADEA's text and ignores the critical differences between the language and structure of Title VII and the ADEA. Petitioners' invocation of broad statements of congressional purpose ignores that Congress also chose means other than litigation to accomplish the ADEA's purposes. Finally, even if the statute could be plausibly deemed to be ambiguous, the EEOC's interpretation is not entitled to deference. The judgment of the court of appeals should be affirmed.

A. The ADEA's Text, Structure and Purpose Do Not Support Disparate Impact Claims

The text of section 4(a)(2) squarely refutes the notion that disparate impact claims are cognizable under the ADEA. Petitioners nonetheless contend that it "is almost incomprehensible" to construe section 4(a)(2) as barring disparate impact liability "given the presence of precisely the same

language in Title VII." Pet. Br. 22. The Court, however, in construing the ADEA has recognized that it is incorrect simply to adopt interpretations of Title VII without further analysis of "the text, structure, purpose, and history of the ADEA." *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236, 1248 (2004). Indeed, simply to lift Title VII's interpretations wholesale and make them a part of the ADEA would ignore that the statutes have different purposes and reflect different legislative compromises between the interests of employers and employees.

For example, in construing Title VII's provision prohibiting race and other specified discrimination, *see* 42 U.S.C. § 2000e-2(a)(1), the Court has made clear that "[i]ts terms are not limited to discrimination against members of any particular race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). Thus, in *McDonald*, the Court held that reverse discrimination claims are maintainable under Title VII. *See id.*

By contrast, in *General Dynamics v. Cline*, the Court declined to recognize reverse age discrimination claims. *See* 124 S.Ct. at 1239. Notwithstanding the close similarity between the language of ADEA § 4(a)(2) and 42 U.S.C. § 2000e-2(a)(1), the *Cline* Court expressly declined to adopt the *McDonald* rule applicable under Title VII. *See* 124 S.Ct. at 1243 n.5. Rather, the Court reached its holding based on a fresh examination of the text, structure, purpose and history of the ADEA. *See id.* at 1240-49.

Petitioners further contend that to reject their reading of section 4(a)(2) is to "inescapably argu[e] that *Griggs* was wrongly decided" and that "this case presents no circumstance that warrants reversing *Griggs*." Pet. Br. 22; *see also id.* at 11-13. Contrary to petitioners' view, taking a fresh look at the language of ADEA section 4(a)(2)—as well as the ADEA's structure and purpose—and concluding that they do not support disparate impact claims no more requires revers-

ing *Griggs* than the Court's recent decision in *General Dynamics* required reversing *McDonald*. Furthermore, whether *Griggs* can be said to have "expressly rel[ied]" on the text of Title VII in creating disparate impact liability, *see* Pet. Br. 22,[2] is beside the point in light of Congress' codification of disparate impact liability under Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (1991) (codified at 42 U.S.C. § 2000e-2(k)). Thus, concluding that the text of ADEA section 4(a)(2) does not support disparate impact liability will have no bearing on the continued availability of such claims under Title VII.[3]

1. The starting point in every case of statutory construction is the language of the statute. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 172 (2001). ADEA section 4(a)(2) states that

[2] Some courts have expressed a contrary view. *See Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 n.13 (10th Cir. 1996) ("*Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII."); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 734 (3d Cir. 1995) (opinion of Greenberg, J.) ("[W]hen the Supreme Court found disparate impact liability under Title VII, it relied not on any specific statutory language but on the policies behind the statute."). *See also* Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L.Rev. 837, 842 (1982) ("The disparate impact test of *Griggs* is a judicially developed doctrine that does not have its origins in the language of Title VII.") (footnote omitted).

[3] Invoking *Griggs*, petitioners urge that "[*s*]*tare decisis* is . . . decisive." Pet. Br. 22. This is a strange contention given that this Court has "never decided whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (citing *Markham v. Geller*, 451 U.S. 945 (1981)) (Rehnquist, J., dissenting from the denial of certiorari). *See also id.* at 618 (Kennedy, J., concurring) ("[W]e have not yet addressed the question whether . . . a disparate impact claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.") (citations omitted).

"[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age[.]" 29 U.S.C. § 623(a)(2).

Petitioners provide no credible construction of the statutory text. Instead they offer only the conclusory assertion that "the phrase 'because of'—unlike such terms as 'willfully,' or 'purposefully,' or knowingly'—does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation." Pet. Br. 22.

Petitioners' contention ignores the ordinary meaning of the phrase "because of." In common usage, the phrase means "[b]y reason of; on account of." *Webster's New International Dictionary* 242 (2d ed. 1955) (hereinafter *Webster's Second*). *See also Webster's Third New International Dictionary* 194 (1986) (same); *The American Heritage Dictionary Of The English Language* 117 (1981) (same). *Webster's* further defines "reason" as "[a] consideration, motive, or judgment inducing or confirming a belief, . . . or leading to an action or course of action; a rational ground or motive." *Webster's Second*, at 2074. *The American Heritage Dictionary* similarly defines "reason" as "[t]he basis or motive for an action, decision, or conviction." *Id.* at 1086.

Thus, contrary to petitioners' contention that "because of" "does not refer to an actor's state of mind in all (or even most) contexts," Pet. Br. 22, the most natural reading of the phrase "because of such individual's age" is, as the Court held in *Hazen Paper*, that the employee's age must be "the motivating factor" behind the employer's decision to discriminate. 507 U.S. at 611. Petitioner's construction of section 4(a)(2) as only requiring a showing of "but for" causation denies the statutory text its ordinary meaning.

Petitioners further assert that "a policy can 'adversely affect [an employee] because of such individual's age' even if that policy is not motivated by age." Pet. Br. 23 (citing 29 U.S.C. § 623(a)(2)). The punctuation of section 4(a)(2) makes clear, however, that the "because of" clause modifies the entire enumeration of employer practices and not just practices which "otherwise adversely affect" an employee's status. *See DiBiase*, 48 F.3d at 733 (opinion of Greenberg, J.). *See also* Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843 & n.27. Petitioners' proposed construction thus ignores the punctuation of the text as well as its ordinary meaning. *See United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979) ("[W]hile matters like punctuation [are] not decisive of the construction of a statute, where they reaffirm conclusions drawn from the words themselves they provide useful confirmation.") (internal quotation and citation omitted).[4]

---

[4] Petitioners make several other arguments based on the grammatical structure of section 4(a)(2). First, they contend that "[h]ad Congress wished to restrict the ADEA to purposeful discrimination, it would more naturally have placed the words 'because of' far earlier in the provision, such that they would have described the *employer's* acts: 'It shall be unlawful for an employer, *because of an employee's age*, to limit, segregate, or classify * * *.'" Pet. Br. 23. Petitioners' suggestion, however, no more clearly expresses an intent that the ADEA be limited to purposeful discrimination than the wording and punctuation of the statute Congress enacted.

Petitioners further argue that because section 4(a)(2) describes the employer's conduct in the plural form and the "'because of' clause" uses the singular, it would be grammatically incorrect to read the "because of" clause as modifying (by imposing a purpose requirement) the types of prohibited employer conduct. *See* Pet. Br. 23-24. Petitioners ignore that while Congress used the plural term "employees" to describe employer actions that "limit, segregate, or classify employees," it then used the singular in proscribing only those employer practices that "deprive . . . any *individual* of employment opportunities." 29 U.S.C. § 623(a)(2) (emphasis added). Whether or not Congress achieved grammatical perfection, petitioners' contention that "the Fifth Circuit's decision requires reading the statute to render it unlawful for an employer 'to limit,

Indeed, their argument ignores that the punctuation and placement of the "because of" clause in section 4(a)(2) parallels the structure of section 4(a)(1), the ADEA's first prohibitory subsection, which does not contain the "adversely affect" language. *Compare* 29 U.S.C. § 623(a)(1) *with id.* § (a)(2). *See also* Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843.

In short, section 4(a)(2) cannot fairly be construed to authorize disparate impact claims. As the Court has unanimously explained, "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper*, 507 U.S. at 610. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes" about age. *Id.* (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). "'[T]he available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.'" *Id.* at 611 (quoting *EEOC v. Wyoming*, 460 U.S. at 231). The ADEA accordingly "commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.'" *Id.* (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985)).

The Court has further explained that "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." *Id.* at 611. Thus, in *Hazen Paper* the Court unanimously held that an adverse employment decision made to deprive an older worker of pension rights did not violate the ADEA, even though the employer

---

segregate, or classify his *employees* * * * because of such *individual's* age," Pet. Br. 23-24, is simply sleight of hand.

was motivated by a factor that was clearly "correlated with age." *Id.*

An age-neutral employment practice does not present "the problem of inaccurate and stigmatizing stereotypes," *id.*, even if there is a demonstrable correlation between the practice and age. Consequently, to construe section 4(a)(2) to prohibit employment practices which are not motivated by an intent to discriminate but which have a disparate impact on persons over the age of 40 is irreconcilable with section 4(a)(2)'s text and purpose.[5]

2. Petitioners further argue that the ADEA's provision exempting employers from liability for a "differentiation . . . based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), supports disparate impact claims. Pet. Br. 19. Contrary to petitioners' contention, the RFOA provision does

[5] In section 715 of Title VII, Congress directed the Secretary of Labor to "study . . . the factors which might tend to result in discrimination in employment because of age[,] . . . the consequences of such discrimination," and make recommendations for legislation. A portion of the Secretary's report discussed various "institutional arrangements that indirectly restrict the employment of older workers," some of which were age-neutral practices. U.S. Dep't of Labor, *The Older American Worker Age Discrimination In Employment* 15-17 (1965). While the Secretary recommended various measures such as reform of pension plans and changes to seniority arrangements, the report did not suggest that the creation of a cause of action to challenge age-neutral practices was necessary. *See id.* at 22.

Subsequently, the Secretary, in forwarding a draft bill of the ADEA, explained that "[t]he legislation also provides for attention to be given to institutional arrangements which work to the disadvantage of older workers, including those giving rise to involuntary retirement. Research would be undertaken and promoted with a view to reducing barriers to the employment of older workers." Letter from W. Willard Wirtz, Secretary of Labor, to Hon. John W. McCormack, Speaker, U.S. House of Representatives, and Hon. Hubert H. Humphrey, President, U.S. Senate 2 (Jan. 23, 1967) (hereinafter "Wirtz Letter"). The Secretary did not, however, recommend the creation of a disparate impact cause of action.

not "necessarily impl[y] that it is possible to violate section 4(a) . . . without having a discriminatory purpose." *Id.* at 19. Nor are petitioners correct in asserting that the requirement that the factor be reasonable "would be mere surplusage if no disparate impact claims were cognizable in the first place." *Id.*

It would be perverse to judicially impose a theory of liability which is not based on the express language of the ADEA's substantive prohibitions but rather is derived by an implication from a provision which is not even a "true affirmative defense[]." 1 Barbara Lindemann, *et al.*, *Employment Discrimination Law* 613 (3d ed. 1996).[6] Unlike the other provisions of section 4(f), the RFOA is more akin to a general denial by the employer "that age was a basis for the conduct under scrutiny." *Id.*[7] *See also Hazen Paper*, 507 U.S. at 611 ("[w]hen the employer's decision *is* wholly motivated

[6] As Secretary Wirtz explained in transmitting the draft legislation to Congress: "The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age, including but not limited to bona fide occupation qualifications . . . would not fall with the proscription." Wirtz Letter, *supra*, at 1-2.

[7] The Court has explained that the parallel provision of "§ 4(f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. By requiring a showing of *actual intent* to discriminate in those aspects of the employment relationship protected by the provisions of the ADEA, § 4(f)(2) redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989) (emphasis added). While Congress subsequently enacted legislation providing that an employer (or labor organization) "shall have the burden of proving that . . . actions [taken pursuant to section 4(f)(2)] are lawful," *see* Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 979 (codified at 29 U.S.C. § 623(f)(2)), no such language appears in section 4(f)(1). *See* 29 U.S.C. § 623(f)(1).

by factors other than age," the purposes of ADEA are not implicated). That Congress chose to make this clear by enacting the RFOA provision does not support petitioners' suggestion that disparate impact liability should implied from the provision. Moreover, in light of petitioners' repeated arguments based on the similarities between the ADEA and Title VII, *see* Pet. Br. 12-15, it bears emphasis that Title VII contains no language similar to the RFOA provision. *Compare* 42 U.S.C. § 2000e-2 *with* 29 U.S.C. § 623(f)(1).

The Court has explained that the RFOA provision was enacted "in order to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. As several courts of appeals have recognized, the provision is antithetical to the notion that disparate impact claims are cognizable. *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999) ("[I]f the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.'"); *DiBiase*, 48 F.3d at 734 (opinion of Greenberg, J.) ("[B]y the statutory language itself, Congress recognized that neutral practices not motivated by discriminatory intent may be permissible employment practices."); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994) (RFOA provision "suggests that decisions which are made for reasons independent of age but which happen to correlate with age *are not actionable under the ADEA*") (emphasis added).

Rejecting the existence of disparate impact liability does not render the word "reasonable" (as petitioners contend) "mere surplusage." Pet. Br. 19. Quite the opposite, the provision is naturally understood as defining the parameters of a prima facie case of disparate treatment, when, as is often the case, there is no direct evidence of an employer's discriminatory intent. While the ADEA recognizes that employ-

ers may differentiate between employees based on a wide variety of legitimate factors, the requirement that a factor be "reasonable" guards against an employer's pretextual use of a factor other than age to engage in age-based discrimination. *See, e.g., Hazen Paper*, 507 U.S. at 613; *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one."). Thus, the word "reasonable" is not surplusage and its presence in section 623(f)(1) does not support judicial implication of disparate impact liability.

B. The EEOC's Interpretation Is Not Entitled To Deference

As explained above, the ADEA's text, structure and purpose make clear that Congress did not authorize disparate impact claims under the statute. That should be "the end of the matter" as "the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Nonetheless, even if this Court were to conclude that the ADEA is ambiguous, the EEOC's regulation is not entitled to deference under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Court has stated that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes and citations omitted). As the Court explained in *Skidmore*, "The weight [accorded to an administrative] judgment in a particular case will depend

upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140 (quoted in *Mead*, 533 U.S. at 228). As explained below, the EEOC's disparate impact regulation does not meet these standards.

First, petitioners misstate the extent to which the EEOC and DOL (which was originally vested with power to enforce the act) have interpreted the ADEA to authorize disparate impact liability. Indeed, the original rule—which was not subjected to the APA's notice and comment provisions—suggested that nothing more than pretextual disparate treatment claims were cognizable. *See* 33 Fed. Reg. 9172 (Jun. 21, 1968). DOL explained that "it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job." *Id.* at 9173 (quoting 29 C.F.R. 860.103(c) (1968)). DOL further observed that "[t]he clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual." *Id.* As explained above, *see supra* at 10, when an employer applies age-neutral work rules, age is clearly "not a determining factor" even when a rule correlates with age. *Id.*; *see also Hazen Paper*, 507 U.S. at 611.

Most significantly, DOL's regulation further stated that "[t]he reasonableness of a differentiation will be determined on *an individual, case by case basis, not on the basis of any general or class concept*, with unusual working conditions given weight according to their individual merit." *Id.* (quoting 29 C.F.R. 860.103(d) (1968)) (emphasis added). This regulation is irreconcilable with disparate impact liability. One of

the critical premises underlying disparate impact liability is that a large statistical imbalance between classes supports an inference of discrimination. *See, e.g.*, Barbara T. Lindemann & David D. Kadue, *Age Discrimination in Employment Law* 414 (2003); *International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339 & n.20 (1977). The other is that the classes being compared are large enough to create statistical significance. *See Age Discrimination in Employment Law*, *supra*, at 414; *Teamsters*, 431 U.S. at 339 n. 20. DOL's original determination rejecting the use of the "class concept" refutes petitioners' assertion that DOL and EEOC have consistently interpreted the ADEA as recognizing disparate impact liability.

While DOL's RFOA rule required that an employer establish the validity of some age-neutral practices (such as physical fitness and physical examination requirements), at most this supports the recognition of pretextual disparate treatment claims and not class-based disparate impact liability. This is made clear by DOL's 1969 amendment to the RFOA rule, which stated that "situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute." 34 Fed. Reg. 323 (Jan. 9, 1969) (codified at 29 C.F.R. 860.104(b) (1969)).

The assertion that DOL and EEOC have consistently interpreted the ADEA to provide for disparate impact liability is also refuted by the EEOC's 1981 rulemaking. There, the EEOC explained that it had *rewritten* the RFOA regulation "to *make it clear* that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity." 46 Fed. Reg. 47724, 47725 (Sept. 29, 1981) (citing *Griggs*) (emphasis added). Notwithstanding the EEOC's assertion, the 1981 regulation

was in fact the first time a federal rule provided that an employment practice could be challenged if "such a practice has an adverse impact on individuals within the protected age group." *Id.* at 47727 (codified at 29 C.F.R. 1625.7(d)).

Beyond the inconsistency between the DOL and EEOC rules, there are several other reasons for not deferring to the EEOC's regulation. Petitioners make much of the fact that EEOC conducted a notice and comment rulemaking and "made changes to the regulation in response to public comment." Pet. Br. 30 (internal quotations and citation omitted). The EEOC made no attempt, however, to reconcile its interpretation with the ADEA's text, purpose and the nature of age discrimination. Indeed, not once did the EEOC even discuss whether the substantive prohibitions of section 4(a)(1) & (2) encompass non-pretextual age-neutral practices. *See generally* 44 Fed. Reg. 68858-62 (Nov. 30, 1979); 46 Fed. Reg. 47724-28 (Sept. 29, 1981). Rather, it is apparent that the EEOC simply adopted disparate impact analysis because of its conclusion—on a matter of pure statutory construction—that the ADEA should, in the agency's words, "be interpreted in a manner which is consistent with Title VII." 44 Fed. Reg. 68858 (Nov. 30, 1979). *See also* 46 Fed. Reg. 47725 (Sept. 29, 1981) (citing *Griggs*).[8]

---

[8]That the EEOC simply imposed its legal interpretation without any independent reasoning as to the ADEA's text and purpose is further manifested by its re-writing of the RFOA regulation to impose on employers the requirement that an age-neutral practice which has a disparate impact "must be justified as a business necessity." 46 Fed. Reg. 47725 (Sept. 29, 1981); *see also id.* at 47727 (29 C.F.R. 1625.7(d)). This standard finds no support in the text of the ADEA's RFOA provision. *See* 29 U.S.C. § 623(f)(1); Donald R. Stacy, *A Case against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L.J. 437, 448 (1984) ("[T]he regulation is in conflict with the statute it seeks to interpret in its extension of the business necessity test."). Because the regulation plainly conflicts with the language of the statute it is not entitled to deference. *See Chevron*, 467 U.S. at 843.

In support of its disparate impact rule, the EEOC also cited *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975). *See* 46 Fed. Reg. at 47725. While *Laugesen* involved an ADEA claim, it was a disparate treatment case. *See* 510 F.2d at 311-13 (discussing applicability of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Most remarkably, the Sixth Circuit expressly stated in *Laugesen* that "it would be inappropriate simply to borrow and apply [the *McDonnell Douglas* standard] automatically." *Id.* at 312. As the Sixth Circuit reasoned, "[t]hat [Title VII] is embodied in a separate act and has its own unique history at least counsels the examiner to consider the particular problems sought to be reached by the statute." *Id. See also id.* ("[W]hile the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.").

It is inappropriate to defer to the EEOC's interpretation of the ADEA because it is not based on any independent reasoning or expert analysis of the problem of age discrimination but rather is based on this Court's construction of a statute which addresses the different problems of race, religion and gender-based discrimination. Indeed, as Secretary Wirtz explained, it is patently unreasonable to do so:

> The Nation has faced the fact—rejecting inherited prejudice or contrary conviction—that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy—and wrong.*

U.S. Dep't of Labor, *The Older American Worker: Age Discrimination In Employment* 1 (1965) (emphasis added).

As the Secretary's report made clear, "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example —race." *Id.* at 2. Indeed, the fundamental premise underlying *Griggs*—that widespread and persistent societal discrimination had resulted in "'built-in headwinds'" which prevented members of minority groups from obtaining employment, 401 U.S. at 432—does not exist with respect to age discrimination.

As the Secretary explained: "Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned." *The Older American Worker*, *supra*, at 2. Rather, the ADEA was targeted at employer practices which use age as a criterion for denying employment opportunity "because of assumptions about the effect of age on [an employee's] ability to do a job *when there is in fact no basis for these assumptions*." *Id.*; *see also Hazen Paper*, 507 U.S. at 610-11.

The ADEA accordingly strikes a different balance between the interests of employees and employers than does Title VII. The EEOC's imposition of ADEA disparate impact liability because it is available under Title VII–a position which the agency has not defended in briefing in this Court in either this case or *Adams v. Florida Power Corp.*[9]—is manifestly unreasonable. Its regulation is not entitled to deference under either *Chevron* or *Skidmore*.

[9] *Writ dismissed as improvidently granted*, 535 U.S. 228 (2002).

(202)**JUDICIAL CREATION OF AN ADEA DISPARATE IMPACT CLAIM WOULD SERIOUSLY UNDERMINE THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO EFFECTIVELY MANAGE THEIR WORKFORCES**

As explained above, neither the text, structure, purpose nor legislative history of the ADEA establish that Congress intended to create a cause of action to challenge age-neutral practices because they may have a disparate impact on employees within the protected class. Many essential workforce practices have some correlation with age. As explained below, judicial sanctioning of disparate impact ADEA claims has unduly restricted the ability of governmental employers to manage their workforces and provide cost-effective public services. Moreover, even when a governmental em-ployer ultimately prevails in a disparate impact suit, the litigation costs of defending an age-neutral employment practice may well exceed the cost-savings that the practice was meant to provide.

For example, in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), a school board had adopted a cost-cutting policy of generally recruiting new teachers with no more than five years experience. At trial, the plaintiff introduced statistical evidence showing "that 92.6% of Connecticut teachers between 40 and 65 years old . . . have more than 5 years experience, while only 62% of teachers under 40 have taught more than five years." 635 F.2d at 1030. The district court relied on *Griggs* to hold that the "policy was discriminatory as a matter of law," and rejected the school board's contention that the ADEA required proof of a discriminatory motive. *Id.*

The Second Circuit affirmed. The court acknowledged that "the significance of the 92.6% figure is somewhat weakened by evidence that over 60% of teachers under 40 also have had

more than five years experience." *Id.* at 1032-33. It nonetheless "agree[d] with [the district court's] finding that the high correlation between experience and membership in the protected age group. . . . would render application of the [school board's] policy discriminatory as a matter of law, since, absent countervailing statistics, the likelihood of a person over 40 being selected under the policy would be substantially less than that of a person under 40." *Id.* at 1033 (citation omitted). According to the court, "[*t*]*he purpose of the . . . policy was to economize by employing less experienced teachers*, which would inevitably open more teaching opportunities to younger less experienced applicants than to the older, who were more experienced." *Id.* at 1033 (emphasis added).

The court then rejected the school board's contention that the policy was justified by the need to cut costs due to budgetary pressures. *See id.* at 1034. Relying on a Department of Labor regulation which prohibited the classification of employees "'solely on the basis of age for the purpose of comparing costs,'" *id.* (quoting 29 C.F.R. 860.103(h) (1979)), the court ruled that "[t]his cost justification must fail." *Id.* The court did so notwithstanding that the school board's policy made "no reference to age and . . . in practice has had a significant impact on teachers under the age of 40 as well as those over that age." 451 U.S. 945, 948 (Rehnquist., J., dissenting from denial of certiorari). According to the court of appeals, "Ms. Geller established disparate impact by proving that she was subjected to a facially neutral policy disproportionately disadvantaging her as a member of a protected class." 635 F.2d at 1034 (citing *inter alia Griggs*).[10]

[10] The court of appeals also held that Ms. Geller had "established a prima facie case of discriminatory treatment under *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973)." 635 F.2d at 1034. It is clear, however, that the case was not tried under this theory and the district court did not instruct the jury on the elements of a disparate treatment claim. *See Geller v. Markham*, 481 F.Supp. 835, 839 (D.Conn. 1979) (rejecting defendants' motion for new trial) (Geller "does not challenge the motive of those who made the individualized decision to hire her. . . . Ms. Geller falls squarely within the Griggs line of authority, and the McDonnell Douglas notions of motive are inapplicable."). *See also* 635 F.2d at 1034 n.3 ("the trial court failed to instruct the jury on the specific elements of a *McDonnell Douglas* prima facie case").

As then-Justice Rehnquist explained, the Second Circuit's holding "manages to tie the hands of local school boards in dealing with ever-increasing costs without the sanction of the Act which Congress passed to protect older workers." 451 U.S. at 948. The court's "rationale would similarly prohibit the Board from deciding no longer to give full credit for teaching experience received at other school districts." *Id.*

Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983), is another example of the use of adverse impact analysis to prevent public employers from taking necessary action to control costs. In *Leftwich*, the Missouri legislature transferred control of a college from the St. Louis Board of Education to the state college system. *Id.* at 689. The college, however, had much higher faculty costs than other institutions in the state college system. Its board of regents therefore adopted a plan to reduce the number of full-time faculty members by a third (from 51 to 34) and "to reserve certain positions on the . . . faculty for nontenured staff." *Id.* at 690.

Following the transfer, the regents invited the faculty to apply for positions at the state college. Leftwich, a biology professor, was not rehired when the number of biology faculty was reduced from three to two–one tenured and one non-tenured. *Id.* at 689. Leftwich then sued under the ADEA on the ground that "[b]y reserving non-tenured positions, [the regents] adversely affect older teachers since a larger share of non-tenured teachers than tenured teachers are under forty

years of age." *Leftwich v. Harris-Stowe State College*, 540 F.Supp. 37, 41 (E.D.Mo. 1982).

Leftwich's expert testified "that the mean age of the tenured faculty at the 'old' city college was 45.8 years, while the mean age of nontenured faculty was 34.3 years" and that the "mean annual salary at the 'old' city college for tenured faculty was $ 17,900 compared to $ 13,025 for nontenured faculty." 702 F.2d at 690. Based on the meager evidence provided by such a small statistical base, the district court found for Leftwich, holding that he had "established a prima facie case of discriminatory impact" and that the regents' contention that it was "necessary to reserve certain positions for non-tenured teachers in order to cut expenses" was "not a valid business excuse to defend a prima facie case of disparate impact." 540 F.Supp. at 41-42.

The court of appeals affirmed. According to the court, Leftwich's statistical evidence established that the board's policy had a disparate impact on older faculty members. *See* 702 F.2d at 690-91. Moreover, the plan's purpose of reducing faculty costs "did not establish a business necessity defense." *Id.* at 691. While acknowledging that the "plan was based on tenure status rather than explicitly on age," the court reasoned that "because of the close relationship between tenure status and age, the plain intent and effect of the . . . practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts." *Id.* According to the court, "[i]f the existence of such higher salaries can be used to justify discharging older employees, then the purpose of the ADEA will be defeated." *Id.*

While the court of appeals discussed the mean age of the tenured and non-tenured faculty prior to the re-organization, neither it nor the district court indicated the mean age of the new tenured and non-tenured faculty. Moreover, neither the court of appeals nor the district court examined the tenure

status and ages of the faculty who were not rehired, a telling omission as the purpose of disparate impact analysis is to determine the effect of the employer's policy on a protected group. Furthermore, given that at most 16 faculty members were terminated, *see* 702 F.2d at 689, the population was not large enough to produce a statistically significant inference of age discrimination. *See, e.g., International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) ("Considerations such as small sample size may . . . detract from the value of [statistical] evidence."); *cf. Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974) ("[T]he District Court's concern for the smallness of the sample presented by the 13-member Panel was. . . well founded.").

Finally, in *Leftwich* the court of appeals affirmed the district court's order reinstating the plaintiff to a tenured faculty position in the biology department. *See* 702 F.2d at 693. The regents, however, had previously determined that only two biology faculty were necessary, a decision which presumably was also based in part on course demand. *See* 540 F.Supp. at 40. The federal courts' disregard of the college's justification for its hiring plan typifies the undue intrusion on the core management prerogatives of public employers which results from the filing of ADEA disparate impact claims. Such judicial scrutiny of essential personnel practices falls outside the ADEA's purpose of reducing arbitrary age-based employment decisions "on the basis of inaccurate and stigmatizing stereotypes." *Hazen Paper*, 507 U.S. at 610.

Many necessary employment rules and policies have some correlation with age. To be sure, governmental employers may ultimately prevail on disparate impact claims. But because the threshold to state a prima facie case of disparate

impact is easily met, in many instances even weak cases can only be resolved after extensive discovery and/or trial.[11]

This point is demonstrated by a case similar to petitioners' suit, in which the plaintiffs brought a disparate impact claim alleging that a state university had a "practice of paying market rates of salary to new faculty hires, but not paying the market rate to incumbent professors." *MacPherson v. University of Montevallo*, 922 F.2d 766, 770 (11th Cir. 1991). The plaintiffs claimed that this practice had "a disparate impact on older people because they tend to be the faculty members who have been at the University the longest." *Id.* at 770-71. They did so notwithstanding that the university had provided salary adjustments for market-based reasons to professors whose fields were in great demand and had previously provided both plaintiffs with adjustments. *See id.* at 772. The case nonetheless went to trial, during which the court granted the university's motion for a directed verdict at the close of the plaintiffs' case on the ground that the university had shown "a legitimate business justification for its practice of paying new hires at market rates" and the plaintiffs had failed to prove "the existence of an equally effective, financially feasible, alternative practice." *See id.* at 773.[12]

---

[11] As explained above, both the EEOC and several courts have read the "reasonable factors other than age" language in a manner which renders it merely duplicative of the more stringent "business necessity" test. *See* discussion *supra* at 16-17 n.8 (discussing 29 C.F.R. § 1625.7(d)). *See also Leftwich*, 702 F.2d at 692 ("defendants have failed to meet their burden of demonstrating that their discriminatory selection plan was justified by business necessity"); *Geller*, 481 F.Supp. at 839 ("a showing of disparate impact shifts the burden to the defendants to establish the 'job-relatedness' of their tests or the 'business necessity' behind their policies").

[12] *See also EEOC v. Governor Mifflin School Dist.*, 623 F.Supp. 734 (E.D. Pa. 1985) (EEOC brought disparate impact suit challenging terms of collective bargaining agreement which reduced number of salary steps

Similarly, in *District Council 37 v. New York City Dep't of Parks & Rec.*, 113 F.3d 347 (2d Cir. 1997), the City ultimately won a jury verdict in a disparate impact suit challenging large layoffs that were necessitated by deep budget cuts. In response to a severe fiscal crisis, the City had cut the Park Department's budget from $ 176 million to $ 108 million. *See id.* at 348. Because labor costs were such a large part of the Parks' budget, the Department ultimately laid off "1,585 of its 5,180 employees." *Id.* at 349. While the Department eliminated positions across numerous job □lassifycations, it entirely eliminated the position of "laborer," which then included 187 employees. *See id.* at 349 n.1. The average age of the laborers was 57, and every laborer was over the age of 40. *See id.* However, all the laborers did not lose their jobs. *See id.*; *id.* at 354. Some laborers invoked their seniority to bump workers in other classifications. *See id.* at 349 n.1.

Before the layoffs, 48 percent of the Department's workforce was 40 or older. *See id.* Moreover, "only 40 percent of those laid off were age 40 or older." *Id.* (footnote omitted). Thus, employees over the age of 40 were actually underrepresented in the layoffs, and the workforce in fact became older. The former laborers nonetheless sued the Department on the ground that the layoffs had a disparate impact on employees over the age of 40. *See id.* at 349.

At trial, plaintiffs called an expert witness who had conducted computer simulations of random layoffs. Plaintiffs' expert asserted that if the Department had randomly selected which job categories to cut and how extensive to cut and then applied the seniority rules, only 32 percent of the laid-off workers would have been age 40 or over. *See id.* at 350. This

---

and thereby resulted in the most senior employees getting smaller raises than less senior employees even though the senior employees remained the highest compensated; court granted summary judgment to school district).

was deemed to constitute a prima facie case of disparate impact age discrimination notwithstanding that "those age 40 and older were underrepresented" in the layoffs. *Id.* Moreover, the Department's decision to eliminate the classification of laborer was not dispositive as to whether an employee was ultimately laid off because an employee might invoke seniority rights and retain employment as some did. *See id.*

Although the jury returned a verdict for the City and the court of appeals affirmed, the case nonetheless demonstrates the problematic nature of applying ADEA disparate impact analysis to the personnel practices of public employers. While the plaintiff's statistical evidence was not even remotely probative of arbitrary age-based discrimination, a trial was nonetheless required to resolve the claim.[13] Indeed, the litigation of these claims will typically be extremely costly given the complexity of the discovery and statistical proof involving dueling expert witnesses.[14]

---

[13] *See also Mete, et al., v. New York State Office of Mental Retardation & Dev. Disabilities*, 984 F. Supp. 125, 144 (N.D.N.Y. 1997) (rejecting state employer's summary judgment motion where State "maintain[ed] that . . . RIF was necessitated by the budgetary crisis and that the statistical disparity is explained by the fact that the [laid off employees] are all management level. . . . [T]here are genuine issues of material fact with respect to the trustworthiness of defendants' business justification that precludes [*sic*] summary judgment[.]").

[14] Also troubling was the district court's allowing the case to go to trial on the basis of a comparison of the ages of the laid-off laborers to a computer simulation predicting the average age of random layoffs rather than a comparison of the age of the laid-off workers to the age of the work force. Statistics "come in infinite variety. . . . [T]heir usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. The comparison to random layoffs is unwarranted as few public employers would engage in random layoffs when confronted with the need to significantly restructure an agency for fiscal reasons. Rather, agency heads would evaluate the structure of their workforces and determine which positions are essential and target those that are not for layoffs.

Sanctioning ADEA disparate impact liability would also likely result in other claims that are costly to litigate but which do not implicate the statute's purpose of preventing intentional age-based discrimination. Indeed, because declining physical condition is part of the aging process, it is reasonable to expect extensive litigation challenging job-based physical requirements. *See, e.g., Smith v. City of Des Moines*, 99 F.3d 1466, 1468 (8th Cir. 1996). In *Smith*, a fire captain failed the physical standards as determined by spirometry (lung capacity) and stress (VO2 max) tests necessary to wear a self-contained breathing apparatus (SCBA) while fighting fires. *See id.* at 1468, 1471. The city offered to place the fire captain on sick leave for several months until he became eligible for retirement. *See id.* at 1468. The captain did not, however, apply for retirement. *See id.* The city later offered the captain a leave of absence with benefits to enable him to retire with a full pension. *See id.* The captain again did not file for retirement. *See id.* The city then discharged the captain for failing to meet the physical requirements. *See id.*

Thereafter, the captain sued under the ADEA alleging that the City's physical standards had "a disparate impact on older firefighters." *Id.* While the district court granted summary judgment for the city on the ground that its SCBA standards met the business necessity test,[15] the court of appeals affirmed

---

Furthermore, public employers are frequently subject to the constraints imposed by collectively-bargained agreements. While these agreements may significantly limit a public employer's ability to lay off employees holding certain positions, more senior supervisory positions are typically not covered by the agreement. Faced with a fiscal crisis, a public employer may have no choice but to layoff employees who are predominately within the ADEA's protected class.

[15] The City's spirometry rule was based on the standard developed by the American National Standards Institute (ANSI). *See* 99 F.3d at 1471. The City's VO2 max rule was based on a review of medical literature, which included a study that determined that only 40% of firefighters with

in a split decision, with the dissenting judge contending that the city had failed to "validate its fitness test for job-relatedness to the particular skills and exertional requirements of a fire captain." *Id.* at 1475. The dissent also reasoned that "there is conflicting evidence in the record as to whether the test used and the specific fitness level set by the city are reasonable." *Id.*

The dispute between the panel members in *Smith* is inevitable in disparate impact cases. As a leading authority explains, "[t]hough the key terms ['business necessity' and 'job related'] have been used since *Griggs*, their meaning remains unclear." Barbara Lindemann *et al.*, I *Employment Discrimination Law* 106 (3d ed. 1996). It is plausible to believe that some courts would find, as the dissenting judge in *Smith* did, that the employer's physical standards were unreasonable and not justified by the requirements of the job. *See id.* at 1475. Yet there are a variety of factors that may significantly affect an employee's performance on a physical standards test and which are within the control of the employee, such as whether the employee smokes and whether the employee maintains his physical condition and weight. Allowing adverse impact claims under the ADEA would frequently allow employees to avoid personal responsibility by challenging the standard as having a disparate impact on those over the age of forty.

As the foregoing cases demonstrate, authorizing ADEA adverse impact claims would subject many essential public employer personnel policies to judicial second-guessing even when those practices are not remotely indicative of arbitrary discrimination against workers over the age of 40. While public employers may ultimately prevail in these cases, the costs of doing so are great and can have a profound effect on

---

a VO2 max less than the City's standard were able to complete necessary firefighting tasks in a simulation. *See id.* at 1471-72.

the ability of a governmental unit to provide essential services. Because the ADEA's text, structure and purpose make clear that a plaintiff must show discriminatory intent on the part of a public employer to establish a violation of the act, the Court should reject petitioners' entreaty to imply a disparate impact cause of action under the statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

August 23, 2004

* Counsel of Record for the
Amici Curiae